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Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause or Action?

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WRONGFUL DEATH AND THE UNBORN CHILD: SHOULD VIABILITY BE A PREREQUISITE FOR A CAUSE OF ACTION?

I. INTRODUCTION

Two sisters are enjoying a quiet dinner together. Beth has invited her sister Amy over for dinner. Beth thought this would be a great opportunity to try the chicken cordon bleu frozen entree that her friends have been praising. During their dinner discussion, Beth announces to her sister that she is eight weeks pregnant. Amy, who is in her seventh month of pregnancy, is ecstatic. However, after dinner, Amy and Beth are not ecstatic any more; they are violently ill. Both are rushed to the hospital where their doctor informs them that they both contracted salmonella poisoning from the chicken they had for dinner. The doctor tells them that they will feel nauseous for a while but that they will recover fully. However, both sisters have lost their babies. Both Amy and Beth bring wrongful death suits against the frozen food company. Amy's suit is successful, but Beth is not even allowed to bring her case to trial. The reason behind the two different results is that Amy's unborn child was viable while Beth's was not.[1]

This Comment explores the reasoning behind these surprisingly different results for the loss of a viable unborn child compared to the loss of one which is nonviable. The majority of states permit a wrongful death action for an unborn child,[2] but only six of those states allow a wrongful death action for a nonviable fetus.[3] Many of the states within the majority have held that viability is a prerequisite for the cause of action because of the Supreme Court's landmark abortion decisions.[4] Because the

1. This hypothetical is based loosely on the facts of *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996). The sister in her third trimester was added for the sake of comparison.

2. Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995).

3. Santana v. Zilog, Inc., 95 F.3d 780, 784 (9th Cir. 1996)(noting that five states have recognized a wrongful death action for a nonviable fetus through legislative enactments, and that the West Virginia Supreme Court has recognized a cause of action for a nonviable fetus).

4. *See* Roe v. Wade, 410 U.S. 113 (1973) (developing the trimester approach for abortions). *See also* Doe v. Bolton, 410 U.S. 179 (1973) (*Roe v. Wade's* companion case strik-

Supreme Court used the viability test as a basis for the protection of certain actions in abortion cases, many states decided to use the viability test for all issues dealing with the unborn.[5] As a result, the twenty-five year old constitutional disputes and controversies surrounding the issue of abortion have found their way into other areas of the law, particularly those dealing with unborn children.[6] Six states have realized that the viability test is not necessarily appropriate when dealing with the issue of

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ing down medical restrictions on abortion); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (ending the use of the trimester approach while reaffirming the use of the viability line as the point after which abortions are no longer permitted); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) (upholding an Ohio law requiring that one parent be notified 24 hours before a minor could receive the operation); Hodgson v. Minnesota, 497 U.S. 417 (1990) (striking down a Minnesota law requiring that a minor give both parents at least 48 hours notice before she could have an abortion, but upholding a provision which required 48 hour notification for one parent); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (holding that a Missouri law prohibiting the use of government facilities or hospitals for abortions was valid); Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986) (striking down a law that required that a woman receive seven explicit items of information about the fetus, and required a doctor to use the best opportunity for the child to be aborted alive, and that a second physician be present to provide immediate medical care for the child); Simopolus v. Virginia, 462 U.S. 506 (1983) (upholding a law requiring abortions performed after the twelfth week of pregnancy be performed in hospitals or outpatient clinics); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding a law that required a pathology report after an abortion and that a second physician be present during an abortion after viability); Akron v. Akron Ctr. for Reprod. Health Inc., 462 U.S. 416 (1983) (striking down provisions of a local Ohio law that required all second-trimester abortions be performed in a hospital, that girls under fifteen years of age obtain parental consent or judicial approval); H.L. v. Matheson, 450 U.S. 398 (1981) (upholding a law which required doctors to notify the parents of an unemancipated minor that the child was seeking an abortion); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment which denied Medicaid funds for an abortion except where the life of the mother would be endangered or the pregnancy was a result of rape or incest promptly reported to a law enforcement officer or the public health service); Bellotti v. Baird, 443 U.S. 622 (1979) (striking down a Massachusetts law that required parental consent before a minor could choose to have an abortion without providing an adequate "judicial bypass" alternative); Colautti v. Franklin, 439 U.S. 379 (1979) (invalidating a law that imposed a duty on doctors to preserve the life of the fetus); Beal v. Doe, 432 U.S. 438 (1977) (upholding a Medicaid regulation that denied funds for nontherapeutic abortions); Maher v. Roe, 432 U.S. 464 (1977) (*Beal* companion case upholding the Medicaid regulation that denied funds for nontherapeutic abortions, even when the state paid medical expenses incident to childbirth); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (striking down a Missouri law that required spousal and parental consent).

5. *See infra*, note 17 and accompanying text.

6. *See* Brief *Amicus Curiae* of National Right to Life, Inc. in Support of Casey *in* THE SUPREME COURT CONFRONTS ABORTION: THE BRIEFS, ARGUMENT AND DECISION IN *Planned Parenthood v. Casey* 265-67 (hereinafter Brief) (Leon Friedman ed. 1993) (contending that *Roe* and its progeny have distorted and confused the law concerning unborn children in non-abortion contexts).

wrongful death of an unborn child, because the viability test was established to balance a woman's right to privacy and choice, with the state's interest in promoting life.[7] These states decided that they will not use the lines drawn by the trimester and viability tests to decide cases dealing with the wrongful death of an unborn child caused by a third person.[8] It is somewhat appropriate that the crux of this issue is line drawing because the history of the development of wrongful death actions is replete with lines drawn and then redrawn.[9]

Recent court decisions in South Dakota,[10] Idaho,[11] West Virginia,[12] and Alabama[13] have explored this unsettled issue of whether viability should be a prerequisite to a wrongful death cause of action. The vast majority of states allow a cause of action for children who are injured *in utero* and are eventually born alive.[14] Fewer states permit recovery for the wrongful death of a fetus *in utero*.[15] Currently thirty-seven states permit a wrongful death cause of action for a viable[16] unborn child.[17] Of the

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7. *See Farley*, 466 S.E.2d at 530.
8. *Id.*
9. *See* discussion *infra* § II.
10. Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).
11. Santana v. Zilog, Inc., 95 F.3d 780 (9th Cir. 1996).
12. *See Farley*, 466 S.E.2d at 522.
13. Gentry v. Gilmore, 613 So.2d 1241 (Ala. 1993).
14. *Santana*, 95 F.3d at 783.
15. *Id.*
16. A viable unborn child is "capable of independent existence outside his or her mother's womb, even if only in an incubator." BLACK'S LAW DICTIONARY 1566 (6th ed. 1990) (citations omitted).
17. *See* Espadero v. Feld, 649 F.Supp. 1480 (D. Colo. 1986); Simmons v. Howard Univ., 323 F.Supp. 529 (D.D.C. 1971); Wade v. U.S., 745 F. Supp. 1573 (D. Haw. 1990); Eich v. Town of Gulf Shores, 300 So.2d 354 (Ala. 1974); Summerfield v. Super. Ct., 698 P.2d 712 (Ariz. 1985); Hatala v. Markiewicz, 224 A.2d 406 (Conn. Super. Ct. 1956); Porter v. Lassiter, 87 S.E.2d 100 (Ga. App. 1955); Volk v. Baldazo, 651 P.2d 11 (Idaho 1982); Seef v. Sutkus, 583 N.E.2d 510 (Ill. 1991); Britt v. Sears, 277 N.E.2d 20 (Ind. App. 1971); Hale v. Manion, 368 P.2d 1 (Kan. 1962); Rice v. Rizk, 453 S.W.2d 732 (Ky. Ct. App. 1970); Danos v. St. Pierre, 402 So.2d 633 (La. 1981); State Use of Odham v. Sherman, 198 A.2d 71 (Md. 1964); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975); O'Neill v. Morse, 188 N.W.2d 785 (Mich. 1971); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949); Terrel v. Rankin, 511 So.2d 126 (Miss. 1987); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995) (en banc); Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1994); White v. Yup, 458 P.2d 617 (Nev. 1969); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980); Salazar v. St. Vincent Hosp. 619 P.2d 826 (N.M. 1980); DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984); Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1985); Evans v. Olsen, 550 P.2d 924 (Okla. 1976); Libee v. Permanente Clinic, 518 P.2d 636 (Or. 1974); Coveleski v. Bubnis, 634 A.2d 608 (Pa. 1993); Fowler v. Woodward 138 S.E.2d 42 (S.C. 1954); Farley v. Mount Marty Hosp. Assoc., Inc., 387 N.W.2d 42 (S.D. 1986); Vaillancourt v. Medical Ctr. Hosp. of Vt., Inc., 425 A.2d 92 (Vt. 1980); Moen v. Hanson, 537

twenty-one states whose courts have dealt with the issue of whether or not to extend wrongful death actions to a nonviable fetus, only six currently allow recovery for wrongful death.[18] The other fifteen states have decided not to extend a wrongful death cause of action to a nonviable fetus.[19] This split among the states demonstrates the tension between the law's treatment of a fetus, and medicine's expanding understanding of prenatal physiological development and technology.[20]

Some courts are reluctant to extend the protection of their state's wrongful death statute to *in utero* deaths without clear legislative direction due to the statutory nature and history of the wrongful death cause of action.[21] Some courts are concerned that interpreting wrongful death statutes to include a nonviable unborn child as a "person" for the purposes of the wrongful death statute would create an "inherent conflict" between a woman's constitutional right to terminate her pregnancy prior

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P.2d 266 (Wash. 1975); Baldwin v. Butcher, 184 S.E.2d 428 (W.Va. 1971); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107 (Wis. 1967).

18. The six states that have recognized a cause of action for the tortious death of a nonviable unborn child are:

Illinois — Seef v. Sutkus, 583 N.E.2d 510 (Ill. 1991);

Louisiana — Danos v. St. Pierre, 402 So.2d 633 (La. 1981);

Missouri — Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995);

South Dakota — Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996);

West Virginia — Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995); and

Georgia — Porter v. Lassiter, 87 S.E.2d 100 (Ga. App. 1955) (permitting recovery if the unborn child is "quick," or capable of moving in its mother's womb).

19. *See Santana*, 95 F.3d at 783. *See e.g.* Wade v. United States, 745 F. Supp. 1573 (D. Haw. 1990); Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962); Gentry v. Gilmore, 613 So.2d 1241 (Ala. 1993); Ferguson v. District of Columbia, 629 A.2d 15 (D.C. 1993); Humes v. Clinton, 792 P.2d 1032 (Kan. 1990); Kandel v. White, 663 A.2d 1264 (Md. 1995); Thibert v. Mika, 646 N.E.2d 1025 (Mass. 1995); Fryover v. Forbes, 446 N.W.2d 292 (Mich. 1989); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980); Miller v. Kirk, 905 P.2d 194 (N.M. 1995); Egan v. Smith, 622 N.E.2d 1191 (Ohio App. 1993); Guyer v. Hugo Pub. Co. 830 P.2d 1393 (Okla. App. 1991); Coveleski v. Bubnis, 634 A.2d 608 (Pa. 1993); Micolis v. AMICA Mut. Ins. Co., 587 A.2d 67 (R.I. 1991); West v. McCoy, 105 S.E.2d 88 (S.C. 1958).

20. *See* ASSESSMENT AND CARE OF THE FETUS: PHYSIOLOGICAL, CLINICAL, AND MEDICOLEGAL PRINCIPLES 2-15 (Robert D. Eden, M.D., et al eds. 1990) (describing the various aspects of fetal development). *See also* COMMITTEE ON FETAL EXTRAUTERINE SURVIVABILITY, NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, FETAL EXTRAUTERINE SURVIVABILITY (1988) (discussing the determination of the stage of gestational development at which the fetus can survive outside the womb, the advances in perinatology over the past decade which steadily reduced the age for fetal survival, the growing perception that technology would soon push back the frontiers of fetal survivability to the moment of conception, and the committee's conclusion that 23-24 weeks is the threshold of fetal survival).

21. *Santana*, 95 F.3d at 784.

to viability[22] and the wrongful death cause of action for a nonviable fetus.[23] Other courts do not want to stand in the minority and wish to defer to the majority.[24]

First, this Comment examines both sides of the issue with respect to expanding the protection of wrongful death statutes to a nonviable fetus. Next, it reviews the development and growth of prenatal torts, the wrongful death cause of action, and its extension to unborn children. Then, it analyzes whether or not recognition of a cause of action for a nonviable fetus would erode the right of a woman to procure an abortion, and thereby violate the Supreme Court's holding in *Roe v. Wade*[25] and its progeny.[26] Finally, this Comment calls for an end to the use of the *Roe* viability test as a prerequisite for the wrongful death cause of action.[27]

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22. *See* Roe v. Wade, 410 U.S. 113 (1973).

23. *See* Kandel v. White, 663 A.2d 1264, 1267-68 (Md. 1995).

24. *See* Coveleski v. Bubnis, 634 A.2d 608, 609 (Pa. 1993) (stating that the court will not be "placing Pennsylvania by itself as providing a wrongful death action for an eight week old fetus.") *Id.*

25. 410 U.S. 113 (1973).

26. *See e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (holding that a state may not impose restrictions on doctor/patient relations that are intended to discourage the performance of abortions); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the essential holding of *Roe* recognizing a woman's right to choose an abortion before fetal viability, and holding that the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (disregarding the trimester approach and focusing more on viability as the threshold when a state may regulate abortion).

27. Although "maternal-fetal conflict" issues such as prosecuting mothers for drug and alcohol abuse while pregnant are somewhat closely aligned with wrongful death actions for unborn children, a discussion of these "maternal-fetal conflict" issues would call for a very different analysis regarding *Roe v. Wade*, 410 U.S. 113 (1973) and its recognition of a mother's right to privacy. *See* Whitner v. State, 492 S.E.2d 777 (S.C. 1997) (upholding the sentence of a woman who ingested cocaine during her third trimester of pregnancy); *see also* Edward Walsh, *In Case Against Alcoholic Mother, Underlying Issue is Fetal Rights; Attempted Murder Charge Presents "Minefield" of Legal Questions,* WASH. POST, Oct. 7, 1996, at A4 (reporting on a Wisconsin district court holding that a woman who attempted to drink her unborn child to death must stand trial for attempted murder). For a discussion of the "maternal-fetal conflict" see DEBORAH MATHIEU, PREVENTING PRENATAL HARM: SHOULD THE STATE INTERVENE? (2d ed. 1996); BONNIE STEINBOCK, PH.D., LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 127-63 (1992); Carolyn Coffey, Note, Whitner v. State: *Aberrational Judicial Response or Wave of the Future For Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211 (1997); Rebekah R. Arch, RN, Comment, *The Maternal-Fetal Rights Dilemma: Honoring a Woman's Choice of Medical Care During Pregnancy*, 12 J. CONTEMP. HEALTH L. & POL'Y 637 (1995); Robin Abcarain, *A New Strategy for Pregnancy Police*, L.A. TIMES, Sep. 18, 1996, at E1; and Scot Lehigh, *Common Sense or a New Way to Ban Abortion,* BOSTON GLOBE, Sept. 15, 1996, at D1.

II. BACKGROUND

A. The Development of Wrongful Death Actions

Currently, all fifty states permit a wrongful death cause of action allowing relatives or heirs of a deceased person to sue the tortfeasor responsible for the death. However, past history indicates that this was not always the case.[28] The common law did not provide a wrongful death action for victim's relatives.[29] In 1808, Lord Ellenborough declared that "in a civil court the death of a human being could not be complained of as an injury."[30] The deceased obviously was unable to complain of the injury, and although a spouse, or parent had a cause of action against a tortfeasor for expenditures and for the loss of services or society, resulting from a nonfatal injury, spouses or parents of the deceased were denied a cause of action for a similar loss resulting from the death of the wife or child.[31] Hence, when the victim died, so did the cause of action.[32] By allowing a cause of action to die with the victim, it became "cheaper to kill a person than to scratch him."[33]

To correct this "intolerable result,"[34] England's Parliament passed the first wrongful death statute, Lord Campbell's Act,[35] in 1846.[36] Over time, all fifty of the United States eventually followed England's Parliament by adopting wrongful death statutes.[37] Most of the statutes enacted in the United States were modeled after Lord Campbell's Act, which created a new cause of action for the victim's family or others who might have suffered a loss from the victim's death.[38]

The wrongful death statutes continued to develop after their enactment in the middle of the nineteenth century.[39] Initially, courts limited recov-

28. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 127, at 945 (5th ed. 1984).

29. *Id.*

30. *Id.* (quoting Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

31. KEETON ET AL., *supra* note 28, at 942.

32. Farley v. Sartin, 466 S.E.2d 522, 525 (W. Va. 1995).

33. KEETON ET AL., *supra* note 28, at 942. Some unfounded legends report that the "cheaper to kill than to scratch" result was "the original reason that passengers in Pullman car berths rode with their heads to the front [and] that the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those merely injured." *Id.* at 942 n.24.

34. *Id.* at 945.

35. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch.93 (Eng.).

36. KEETON ET AL., *supra* note 28, at 945.

37. *Id.* at 945-46.

38. *Id.*

39. *Id.* at 935-51.

ery to the tangible loss of the pecuniary benefits associated with the deceased because of the difficulty in evaluating mental and emotional damages suffered by the survivors, and the victim's possible future earnings.[40] Over time, however, many developments and changes have occured.[41] The recent trend in wrongful death actions allows recovery for intangible losses, such as the value of the services the victim could have performed,[42] and the loss of the deceased's love and affection, otherwise known as the loss of society.[43]

Through the creation and continuous development of wrongful death statutes, the law has worked to remedy the unjust results that occurred prior to the enactment of Lord Campbell's Act, but there is still a need for judicial action to fill the gaps of the statute.[44] Regardless of the gaps that still exist in the wrongful death statutes, the law no longer promotes the theory that it is cheaper to kill a person than merely to injure him.

B. The Development of Prenatal Torts: Moving From the Single-entity View to the Born Alive View

As the wrongful death cause of action developed throughout time, so too did recognition that a fetus could be injured separately and distinctly from its mother. Today, every jurisdiction in the United States recognizes a cause of action for the consequences of tortious prenatal injuries for an unborn child who is subsequently born alive.[45] However, until 1946, most courts did not allow actions for prenatal injuries.[46] Following a decision by Justice Oliver Wendell Holmes, then a member of the Massachusetts Supreme Judicial Court,[47] most courts failed to see the unborn child as existing at the time of the action and accordingly, held that the defendant owed no duty to someone not in existence.[48]

In 1884, Holmes first articulated his "single-entity view"[49] in *Dietrich v.*

40. *Id.* at 951.
41. *Id.*
42. *Id.*
43. *Id. See also* Gary A. Meadows, Commentary, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 108-11 (1992) (discussing the various approaches used by courts to determine the loss of society element of damages).
44. KEETON ET AL., *supra* note 28, at 960.
45. *Id,* at 368.
46. *Id.*
47. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
48. *Id.*
49. *See* Farley v. Sartin, 466 S.E.2d 522, 526 (W. Va. 1995). *See also* Barbara A. Lingle, *Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come*, 44 ARK. L. REV. 465 (1991) (discussing the "single-entity" view).

Inhabitants of Northampton.[50] In *Dietrich*, a woman who was approximately four months pregnant miscarried her baby after she slipped and fell on a defective stretch of highway.[51] Holmes found no precedent stating that the infant could maintain an action for its prenatal injuries if it subsequently survived.[52] Therefore, he found no reason to maintain an action when an infant did not survive.[53] He reasoned that an injury to an infant would also be an injury to the mother, and thus the mother would be entitled to recover for her injuries.[54] This concept, known as the "single-entity" view, states that "a fetus is part of its mother rather than an independent biological entity,"[55] and was widely followed for over fifty years.[56]

The single-entity view was not without its critics.[57] In 1900, Illinois Supreme Court Justice Boggs, dissenting in *Allaire v. St. Luke's Hospital*,[58] criticized the single-entity view as "sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother."[59] While Boggs agreed with Holmes that there was no precedent to award damages to an infant who suffered prenatal injuries, Boggs did not want to follow a precedent that sacrificed the truth.[60]

Boggs considered precedent useful as an illustration of general principles, but found that prior case law should not be the ultimate measure of those principles.[61] Boggs knew that future cases bringing unique and novel issues would continue to arise, but that courts could not be distracted by these "peculiar" issues.[62] Courts must see through these peculiar issues to find the governing principle.[63] Boggs stated that the principles that should have governed in *Allaire* were general tort principles giving redress for personal injuries caused by the actions or negli-

50. 138 Mass. at 17.
51. *Id.* at 14.
52. *Id.* at 15.
53. *Id.*
54. *Id.* at 17.
55. Lingle, *supra* note 49, at 469.
56. *Id.*
57. *See* KEETON ET AL., *supra* note 28, at 368.
58. 56 N.E. 638 (Ill. 1900) (The majority followed the single-entity view, holding that an infant who was injured while *in utero* could not maintain an action for injuries received before birth).
59. *Id.* at 641 (Boggs, J., dissenting).
60. *See id.* at 640-41.
61. *Id.* at 640.
62. *Id.* at 641.
63. *Id.*

gence of another.[64] In denying the right of action for the injured infant, the *Allaire* court was not being faithful to those general principles. The *Allaire* court was allowing *Dietrich* and the single-entity view to be "the measure of the principle"[65] rather than an illustration of it.[66] In Boggs's opinion, "[i]t is but natural justice that an infant, if born alive, should be allowed to maintain an action in the courts for injuries it received in the womb."[67] With his dissent, Justice Boggs began redrawing the line that Justice Holmes created in 1884, and laid the groundwork for the "born alive" rule.[68]

In 1946, the U.S. District Court for the District of Columbia, in *Bonbrest v. Kotz*,[69] was the first court to depart from the single-entity view, and follow the born alive rule advocated in Boggs's dissent in *Allaire*.[70] In *Bonbrest,* the plaintiffs brought an action based on the injuries an infant allegedly suffered during delivery.[71] The defendants moved for summary judgment, arguing they owed no duty to an infant not yet in existence.[72] The court denied the defendant's motion for summary judgment, allowing the action to proceed because of the inherent unfairness in not compensating a child for an infirmity.[73] The court reasoned that an infant who demonstrates an ability to survive outside the womb after sustaining injuries at the hands of a third party ought to have his day in court.[74]

Departing from *Dietrich*, the *Bonbrest* court criticized the use of a long outmoded legal fiction which gave no remedy to an infant injured by another's negligence.[75] Although there were no previous decisions allowing an action for prenatal injuries, the court stated that the absence of precedent should not act as a shield for those who, through intentional or neg-

64. *Id.*
65. *Id.* at 640.
66. *See id.*
67. *Id.* at 642.
68. Farley v. Sartin, 466 S.E.2d 522, 526 (W. Va. 1995). *See also* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 935-36 (1995) (discussing the "born alive" rule).
69. 65 F. Supp. 138 (D.D.C 1946).
70. *Id.* at 138.
71. *Id.*
72. *Id.*
73. *Id.* at 143.
74. *See id.* at 142.
75. *Id.* at 142.

ligent actions, have breached their duty of care to another.[76] In the court's view, no right "is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body."[77] Criticizing the courts of the nineteenth century for proceeding over-cautiously,[78] the *Bonbrest* court would not be strictly tied down to an illogical or outdated precedent.[79] The court wrote that the law must keep pace with science and technology, and when changing conditions and advances in technology, such as our understanding of prenatal development and medicine, make precedent inappropriate, it should no longer be followed.[80] The court continued its analysis by quoting Chief Justice Harlan Stone: "If, with discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law."[81]

The floodgates argument that fictitious claims would result did not dissuade the *Bonbrest* court from taking a decisive step toward the progressive science of law.[82] The court recognized that cases of this character might be difficult to prove.[83] However, the court was more concerned with the right of the child's representatives to have a chance to prove their case, than with the possible difficulties they might encounter once they reached the court.[84]

The *Bonbrest* decision began a trend of going beyond the single-entity rule.[85] Currently, every jurisdiction permits a child, who is subsequently born alive, to bring an action for prenatal injuries, and allows a wrongful death action if the child dies of such injuries after birth.[86] Generally, the born alive rule is applicable even if the child dies shortly after birth.[87] In

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* (stating "[t]he law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884.") *Id.*

80. *See id.* at 143.

81. *Id.* at 142 (quoting Chief Justice Harlan Stone, *Common Law and the United States*, 50 HARV. L. REV. 4, 9-10 (1936)).

82. *Id.* at 142-43. *See also* KEETON ET AL., *supra* note 28, at 367-68 (discussing the difficulty of proving the causal connection between the negligent act and injury to the fetus and how this difficulty could lead to possible fictitious claims).

83. *Bonbrest*, 65 F. Supp. at 142-43.

84. *Id.*

85. KEETON ET AL., *supra* note 28, at 368.

86. *Id.* (citations omitted).

87. Klasing, *supra* note 68, at 936.

rejecting the single-entity view, the born alive rule corrected the patent unfairness in the theory that no duty was owed to unborn children.[88]

The born alive rule, however, has been subject to criticism as well.[89] Many have criticized the rule for being too stringent.[90] For example, in states applying the born alive rule, a child's estate can recover for the child's wrongful death if it is born alive and dies two hours later, but if the "childbirth process lasted a little longer and the child [had] been stillborn two hours later, his estate would not have been able to recover."[91] This judicial line drawing based upon the passage of time rather than the issues at hand narrowed the scope of the born alive rule and produced some unfair results.[92] Eventually, this rule was broadened by the holding in *Verkennes v. Corniea,*[93] which expanded the *Bonbrest* rule by allowing an action for prenatal wrongful death based on the fetus's viability.[94]

C. *Prenatal Wrongful Death: Moving From the Born Alive Rule to Prenatal Wrongful Death—The Law Continues to Evolve*

In 1939, the Supreme Court of Minnesota became the first court in the United States to recognize a cause of action for the wrongful death of an unborn child.[95] Although both mother and child died during labor, the court, in *Verkennes*, viewed these facts as somewhat analogous to the facts of *Bonbrest*, and decided to adhere to the principles expressed in both *Bonbrest,* and the *Allaire* dissent.[96] The court determined that the law must keep pace with science, thus concluding that it was no longer acceptable to view an unborn child as part of the mother.[97] By latching on to the viability language used in *Bonbrest*, the court held that Minne-

88. *Id.* at 935-36

89. *See id.* at 935-37.

90. *See id.* at 935-36.

91. *Id.* at 938 (citing *Kalafut v. Gruver*, 389 S.E.2d 681 (Va. 1990) in which the Supreme Court of Virginia permitted the estate of a child who had died less than two hours after birth to recover for his wrongful death).

92. Brief, *supra,* note 6 (noting the confusion surrounding the law concerning unborn children in non-abortion contexts).

93. 38 N.W.2d 838 (Minn. 1949).

94. *Id.* at 838-39.

95. *Id.*

96. *Id.* at 841.

97. *Id.* The court reasoned that the unborn child "has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable now of being ushered into the visible world." *Id.*

sota's wrongful death statute would support an action for the unborn child. The court reasoned:

> Its language is clear. Thereunder a cause of action arises when death is caused by the wrongful act or omission of another, and the personal representative of the decedent may maintain such action on behalf of the next of kin of decedent. It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited.[98]

The *Verkennes* decision initiated the use of the viability test in cases involving the death of an unborn child. Although the Minnesota Court's view has not been followed as frequently as the *Bonbrest* decision, a majority of jurisdictions now permit wrongful death actions if the unborn child has reached the point of viability.[99] The viability test has been adopted by many states because of the trimester/viability framework that was set forth in the landmark abortion cases *Roe v. Wade*[100] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[101]

D. Abortion and the Use of the Viability Test

In 1973, the United States Supreme Court held a Texas law, which criminalized abortion at any point during a pregnancy unless the mother's life was in danger, unconstitutional because it violated the Fourteenth Amendment.[102] In holding the Texas law unconstitutional, the Court found an implicit right to privacy in the Constitution, and that this right to privacy protected a woman's decision to terminate her pregnancy.[103] By recognizing the right of a woman to terminate her pregnancy, the Court rejected the argument that a fetus "is a 'person' within the language and meaning of the Fourteenth Amendment,"[104] thereby giving it a constitutional right to life.[105] The Court noted that if it were to adopt Texas's argument that a fetus is a "person" who could not be deprived of life without due process of law, the statute would be "out of line with the

98. *Id.*

99. Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995).

100. 410 U.S. 113, 113 (1973).

101. 505 U.S. 833 (1992). *See* Lingle, *supra* note 49, at 483-84 (discussing some courts' use of *Roe* and *Casey* as authority when deciding prenatal wrongful death cases).

102. *Roe*, 410 U.S. at 164.

103. STEINBOCK, *supra* note 27, at 43.

104. *Roe*, 410 U.S. at 156.

105. *Id.* at 156-57.

Amendment's command"[106] because the statute allows the performance of abortions to save the life of the mother.[107]

The Court recognized a woman's right to an abortion, reasoning that a woman's right to terminate her pregnancy was under the broad constitutional right to privacy.[108] The Court stated:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[109]

The Court recognized that a woman had protected privacy interests in her choice to terminate her pregnancy, however the Court did not see this as an absolute right to terminate her pregnancy whenever, and however she chose.[110] While the Court concluded that a woman had a right to choose to have an abortion, that right must be balanced against the state's interest in protecting potential life.[111]

The Court decided that the state's interest becomes sufficiently compelling at the point of viability because the fetus then has the capability of

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106. *Id.* at 157 n.54.

107. *Id.*

108. *Id.* at 153-64.

109. *Id.* at 153. While "[t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* at 152. Discussing how the Court found this right to privacy existing in the Constitution, the Court stated:

> [i]n varying contexts, the Court, or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, and child rearing and education.

Id. at 152-53.

110. *Id.* at 153.

111. *See id.* at 154, stating:

> The Court's decisions recognizing a right to privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.

Id.

living outside the mother's womb.[112] Recognizing viability as the compelling point of state interest, the Court initiated the trimester approach in order to provide a sliding scale on which to balance a pregnant woman's right to privacy with the state's obligation to preserve life and health.[113]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[114] the Supreme Court[115] reaffirmed *Roe's* holding recognizing a woman's right to choose an abortion *before viability*,[116] but rejected the "rigid trimester framework of *Roe v. Wade*."[117] Instead, the Court adopted the "undue burden" analysis.[118] In explaining the undue burden analysis the Court stated:

> [a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[119]

At issue in *Casey* was Pennsylvania's Abortion Control Act.[120] The

112. *Id.* at 163.

113. *Id.* at 154. The Court's decision to utilize the trimester approach meant that, during the first trimester, the abortion decision must be left to the woman and the medical judgment of the pregnant woman's attending physician. During the second trimester, the state may choose to regulate the abortion procedure in ways that are reasonably related to maternal health, such as who is qualified to perform an abortion and where an abortion can take place. During the third trimester, or "the stage subsequent to viability," the state, in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 164.

114. 505 U.S. 833 (1992).

115. The Court's opinion was written jointly by Justices O'Connor, Kennedy, and Souter. Justices Blackmun and Stevens concurred in their reaffirmation of *Roe's* essential holding recognizing a woman's right to choose to have an abortion. *Id.* at 844, 912, 923.

116. *Id.* at 846.

117. *Id.* at 878.

118. *Id.*

119. *Id.* at 877.

120. 18 PA. CONS. STAT. §§ 3201-3220 (1990). The five provisions of the Act that Planned Parenthood challenged required:

> that a woman seeking an abortion give her informed consent prior to the abortion, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. Another provision of the Act requires that, unless certain exceptions apply, a

Court found that only one provision, spousal notification, violated the undue burden analysis.[121] The Court reasoned that some women would not want to notify their spouses about their abortion decision for fear of domestic violence. Therefore the spousal notification provision was an undue burden because it would "operate as a substantial obstacle to a woman's choice to undergo an abortion."[122]

Casey followed the reasoning of *Roe*, in that the state could not place an undue burden on a woman's choice to terminate her pregnancy before viability.[123] The Court admitted that "[a]ny judicial act of line-drawing may seem somewhat arbitrary,"[124] but the viability line has an element of fairness that was developed with great care.[125] The viability line was developed with great care so that the Court might come to a fair and workable balance of the two competing interests in the abortion issue.[126] In its attempt to come to a fair and workable balance between the state's interest in promoting fetal life, and a woman's interest in her right to choose, the Court decided to reject the trimester framework set out in *Roe* because "it undervalues the State's interest in potential life."[127]

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married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. The act exempts compliance with these three requirements in the event of a "medical emergency" which is defined in § 3203 of the Act. In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services.

Casey, 505 U.S. at 844 (citations omitted).

121. *Id.* at 898, 922-23. Justice Stevens concurred with the O'Connor-Kennedy-Souter opinion that the spousal notification provision was an undue burden, but he also believed the counseling and waiting periods were also unconstitutional because they placed an undue burden on a woman's abortion decision. *Id.* at 922. Justice Blackmun would have held all of the challenged provisions of the Pennsylvania Abortion Control Act invalid. *Id.* at 926. Chief Justice Rehnquist, along with Justices White, Scalia, and Thomas would have upheld all of the challenged provisions of the Pennsylvania statute. *Id.* at 944. All this translates into a 5-4 decision to invalidate the spousal notification requirement, a 7-2 decision to uphold the counseling and 24-hour waiting period provisions, and an 8-1 decision to uphold the other provisions.

122. *Id.* at 895.

123. *Id.* at 870.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 874. The majority concluded:

The Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

In rejecting the trimester framework, the Court stated that all burdens placed on a woman when making her choice to terminate her pregnancy are not necessarily undue.[128] The Court concluded that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty,"[129] and the viability line will continue to be the appropriate line for determining when the woman's constitutionally protected liberty is outweighed by the State's compelling interest in the protection of potential life.[130]

E. Does Prenatal Wrongful Death Include the Nonviable?

Recently, four courts have dealt with the issue of prenatal wrongful death actions. Both South Dakota[131] and West Virginia[132] abandoned the use of the viability test in prenatal wrongful death actions, while the Supreme Court of Alabama,[133] and the United States Court of Appeals for the Ninth Circuit, interpreting Idaho law,[134] held that it was appropriate to keep the viability line in place for prenatal wrongful death actions.[135] These decisions illustrate the current split among the states on how to handle the issue of wrongful death of a nonviable unborn child.

1. Idaho and Alabama Maintain the Viability Line

In 1993, the Supreme Court of Alabama grappled with the issue of previable wrongful death and held that the family of a thirteen-week-old fetus did not have a cause of action.[136] The court concluded that the term "minor child" within the Alabama Wrongful Death Act[137] does not include a fetus that has not yet reached the point of viability.[138] The *Gentry* Court relied on *Roe*[139] and *Casey*[140] to support its holding that a fetus must first reach the point of viability before a wrongful death action can

Id. at 875 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

128. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 876 (1992).
129. *Id.*
130. *See id.* at 870-71.
131. Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).
132. Farley v. Sartin, 466 S.E.2d. 522 (W. Va. 1995).
133. Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993).
134. Santana v. Zilog, Inc., 95 F.3d 780 (9th Cir. 1996).
135. *Gentry*, 613 So. 2d at 1241; *Santana*, 95 F.3d at 780.
136. *Gentry*, 613 So. 2d at 1244.
137. ALA. CODE § 6-5-391 (1975).
138. *Gentry*, 613 So. 2d at 1244.
139. 410 U.S. 113 (1973).
140. 505 U.S. 833 (1992).

arise.[141]

In *Santana v. Zilog Inc.*,[142] the United States Court of Appeals for the Ninth Circuit, interpreting Idaho law, also rejected the cause of action for a nonviable fetus, albeit using a different rationale than the Alabama court.[143] The court stated that it was not a federal court's place to expand Idaho's Wrongful Death Act[144] to cover a nonviable fetus without some "clear direction"[145] from the Idaho legislature or courts indicating their desire to implement the minority view[146] and recognize a pre-viability wrongful death action.[147]

Invoking the two most prevalent arguments for limiting liability to the wrongful death of viable fetuses only, the court reasoned that the crux of the case was determining when life began and when a fetus becomes a "person."[148] Philosophers, theologians, and politicians have not found any easy solutions to the dilemma of determining exactly when life begins, and likewise, the court did not offer any.[149] The court agreed that drawing the line at viability might be a "somewhat arbitrary distinction,"[150] but decided that viability provided a "logical point at which to halt further judicial extension of the [wrongful death] cause of action."[151] It considered it the Idaho legislature's responsibility to include nonviable fetuses in the cause of action, and determine when life begins.[152]

Gentry and *Santana* exemplify two different approaches to rejecting the pre-viability wrongful death action. *Gentry* demonstrates the use of the viability doctrine of *Roe* to reject the cause of action.[153] *Santana* employs judicial restraint, and defers expansion of pre-natal wrongful death actions to the state legislature.[154] Both express their reluctance to afford the protection of wrongful death statutes to nonviable fetuses.

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141. *Gentry*, 613 So. 2d at 1244.
142. 95 F.3d 780 (9th Cir. 1996).
143. *Id.* at 781.
144. IDAHO CODE § 5-311 (1990).
145. *Santana*, 95 F.3d at 786.
146. *See e.g.*, Farley v. Sartin, 466 S.E.2d (W. Va. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).
147. *Santana*, 95 F.3d at 785.
148. *Id.* at 786.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. Gentry v. Gilmore, 613 So. 2d 1241, 1244 (Ala. 1993).
154. *Santana*, 95 F.3d at 786.

2. *South Dakota and West Virginia Move Beyond the Viability Prerequisite*

The South Dakota Supreme Court, in *Wiersma v. Maple Leaf Farms*,[155] extended the prenatal wrongful death action beyond viability because of an indication from the state legislature that it desired this result.[156] The court held that under South Dakota's wrongful death statute,[157] the Wiersma's had a valid wrongful death action which guaranteed protection to "a person, including an unborn child."[158] The statute incorporates the words "unborn child," and thus the *Wiersma* court found it easier to recognize wrongful death actions for children *in utero* before viability, as opposed to statutes in other states which simply say "person," "minor child," "natural person," or "one."[159]

The defense argued that the South Dakota statute's use of the term "unborn child" only protected viable unborn children because of the inconsistency in allowing a cause of action for wrongful death of a nonviable fetus, while allowing a woman to procure an abortion up to the twenty-fourth week of pregnancy.[160] The court did not accept defendant Maple Leaf's argument.[161] To accept Maple Leaf Farm's argument "would, ironically, give the tortfeasor the same rights as the mother to

155. 543 N.W.2d 787 (S.D. 1996).

156. Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790 (S.D. 1996) (an action for wrongful death of the Wiersma's clearly nonviable seven to eight week old fetus caused by the salmonella poisoning Mrs. Wiersma contracted from eating a Maple Leaf Farms Chicken Cordon Bleu frozen entree). *See also* Lehigh, *supra* note 27, at D1 (discussing *Wiersma*).

157. S.D. CODIFIED LAWS § 21-5-1 (Michie 1987). The statute provides:

> Whenever the death or injury of a person, including an unborn child, shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if the death had not ensued, then and in every such case, the corporation which, or the person who, would have been liable, if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable, to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony; and when the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. However, an action under this section involving an unborn child shall be for the exclusive benefit of the mother or the lawfully married parents of the unborn child).

Id.

158. *Wiersma*, 543 N.W.2d at 790.

159. *Id.*

160. *Id.* at 791.

161. *Id.*

terminate a pregnancy."[162] "A woman has a privacy interest in terminating her pregnancy, however, defendant[s] [have] no such interest."[163]

The South Dakota Supreme Court also found no need to use the viability test as it has been used in abortion cases, to determine if liability should be extended. It stated:

> the concept of viability is outmoded in tort law. "Viability" as a developmental turning point was embraced in abortion cases to balance the privacy rights of a mother as against her unborn child. For any other purpose, viability is purely an arbitrary milestone from which to reckon a child's legal existence. Viability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development.[164]

The court concluded that the statute's language protecting unborn children gave parents a cause of action regardless of their unborn child's viability.[165]

In *Farley v. Sartin*,[166] the Supreme Court of Appeals of West Virginia, while encouraging its legislature to define the word "person" in the statutes,[167] did not wait for some indication of the legislature's intent when it held that a father could maintain a cause of action for the death of an unborn child, regardless of viability.[168] With reasoning similar to *Wiersma*, the court recognized that following the viability standard would promote injustice and lead to inequitable results.[169] Furthermore, the court found that following the viability standard would run contrary to the underlying principle of tort law that injured parties should be compensated for their injuries.[170] However, the decision in *Farley* is distinguishable from *Wiersma* because the West Virginia statute spoke only of

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162. *Id.*

163. *Id.* (citing People v. Ford, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991)).

164. *Wiersma*, 543 N.W.2d at 792 (footnote omitted) (citing KEETON ET AL, *supra* note 28, at 369).

165. *Wiersma*, 543 N.W.2d at 792.

166. 466 S.E.2d 522, 522 (W. Va. 1995).

167. *Id.* at 535 n.30.

168. *Id.* at 523.

169. *Id.* at 532.

170. *Id. See also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS xxxi (6th ed. 1995) (discussing the traditional view of tort law as corrective justice allowing compensation for injured parties).

a "person" and not an "unborn child."[171]

The West Virginia Court was cognizant of the majority of other states calling for a distinction between viable and nonviable children in applying wrongful death statutes, but it was not persuaded by this reasoning.[172] It viewed the majority position as "unjustified" and "unpersuasive."[173] The court agreed with Justice Maddox's dissent in *Gentry* that drawing a bright line between viability and non-viability to determine who is protected by the wrongful death statutes "necessarily resurrect[s] the same distinctions that led to the adoption of wrongful death statutes in the first place."[174]

III. ANALYSIS

Justice Maddox was correct when he noted that the debate concerning wrongful death actions for nonviable fetuses has a familiar resonance with the discussions that ultimately led to the adoption of wrongful death statutes in the first place.[175] As was the case in 1846[176] and 1946,[177] the law is working to correct what many view to be an injustice.[178] However, the countervailing view is that it is the legislature's responsibility to change the status quo if the status quo is determined to be unjust.[179] Another school of thought is that expansion of liability into nonviable wrongful death would conflict with the United States Supreme Court's

171. *See* W. VA. CODE § 55-7-5 (1994) stating:

> Whenever the death of a person shall be caused by wrongful act neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

Id.

172. *Farley*, 466 S.E.2d at 533.

173. *Id.*

174. *Id.* at 533-34 (quoting Gentry v. Gilmore, 613 So. 2d 1241, 1246 (Ala. 1993) (Maddox, J. dissenting)).

175. *See id.*

176. The year Lord Campbell's (Fatal Accidents) Act was enacted.

177. The year that Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) departed from the born-alive distinction.

178. *See generally* Meadows, *supra* note 43; Lingle, *supra* note 49; and Klasing, *supra* note 68.

179. *See* Santana v. Zilog, 95 F.3d 780, 786 (9th Cir. 1996). *See also* Thiebert v. Milkva, 646 N.E.2d 1025, 1027 n.8 (Mass. 1995) (providing a list of the jurisdictions that agree with the court's holding that expansion of liability is properly left to the legislature).

abortion decisions, and therefore expansion of liability would be unconstitutional.[180] An analysis of these arguments against expanding liability in prenatal wrongful death actions demonstrates that they do not provide compelling reasons to disavow one of the bedrock principles of our tort law, giving "redress for personal injuries inflicted by the wrong or neglect of another."[181]

A. Similarities Between the "Viability" Distinction and Past Bright Line Rules

While not every jurisdiction has stopped using the born-alive test first set out in *Bonbrest*,[182] most have abandoned the born alive rule,[183] finding it stringent and unjust.[184] Similarly, the single-entity view was rejected as archaic and outmoded due to subsequent developments in science and technology.[185] The viability test, at least in its application to tort law, is likewise outmoded and archaic.[186] The viability test does not affect the defendant's legal duty, and its relative nature makes it an unsatisfactory criterion.[187] As is the case with any tort the issues at hand are first, whether the defendant owed a duty of care to avoid unreasonable risk of harm to others, second whether the defendant breached that duty of care, and third whether that breach of duty caused the harm.[188] Although the age of a defendant's victims, whether they are born or unborn, may be relevant in the analysis of the reasonable standard of care for a particular case, it does not act as a bright line preventing the case from ever reaching a jury. The viability line, although useful as a guide for abortion cases, is an arbitrarily drawn line,[189] and if the law relies too heavily on arbitrary line drawing it may very likely become the mechanical, superficial, dry, sterile formalism of which Justice Stone warned.[190]

An example of an unjust and illogical result of the mechanical applica-

180. *See* Toth v. Goree, 237 N.W.2d 297, 301 (Mich. App. 1975) (declining to expand liability into nonviable wrongful death actions).

181. Allaire v. St. Luke's Hosp., 56 N.E.2d 638, 641 (Ill. 1900) (Boggs, J., dissenting).

182. 65 F. Supp. 138 (D.D.C. 1946).

183. *See* Farley v. Sartin, 466 S.E.2d 522, 528 n.13 (W. Va. 1995) (providing a list of the 37 jurisdictions that permit recovery for the death of a viable fetus). *See also infra* note 17.

184. *See* Klasing, *supra* note 68, at 936-37.

185. *Farley*, 466 S.E.2d at 529.

186. *See* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 792 (S.D. 1996).

187. *See* KEETON ET AL, *supra* note 28, at 369.

188. EPSTEIN, *supra* note 170, at 166.

189. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992).

190. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).

tion of the viability bright line is *Miller v. Kirk*.[191] The court in *Miller* held that an eighteen to twenty-two week old fetus injured in a car accident, who was subsequently born alive but then died minutes after birth, was not protected under New Mexico's wrongful death statute because the law permits only an action for the wrongful death of a viable fetus.[192] This mechanical application of the viability test caused the New Mexico Supreme Court to abandon the principle upon which the concept of prenatal torts was built, and upon which all fifty states had agreed, that if a child is born alive he is permitted to maintain an action for those injuries, and if he dies of such injuries after birth an action will lie for wrongful death.[193] In following the viability test without taking into consideration that the child was actually born and existed outside of its mother's womb, if even for just a few minutes, the *Miller* Court may have sacrificed truth to a mere theoretical abstraction, as did Holmes in *Dietrich* with his single-entity rule.[194]

Focusing on a viability bright line test leads the courts applying that test to drift away from the basic principles of our tort law, that we compensate victims for the harm they have suffered through someone else's intentional or negligent actions.[195] To continue distinguishing between viability and non-viability of the fetus as a condition for the application of wrongful death statutes, courts again impose the same type of unjust, arbitrary, bright line test which initially necessitated the adoption of wrongful death statutes.[196] Application of the viability test engenders the same type of unjust results that were prevalent before wrongful death actions were instituted. Consequently, application of the viability test makes it cheaper for someone to "kill" his nonviable victim than to merely injure him.

B. The Legislature's Role in the Wrongful Death of A Nonviable Fetus

It took the development of wrongful death statutes by the states to correct the injustice that it was cheaper to kill someone then merely to injure him. Some courts, such as the *Santana* Court, have held that the legislature must change the law in jurisdictions that do not recognize an

191. 905 P.2d 194 (N.M. 1995).
192. *Id.*
193. *See* KEETON ET AL., *supra* note 28, at 368.
194. *See* Allaire v. St. Luke's Hosp., 56 N.E., 638, 641 (Ill. 1900) (Boggs, J., dissenting).
195. *See* KEETON ET AL., *supra* note 28, at 368-69.
196. *See* Gentry v. Gilmore, 613 So. 2d 1241, 1246 (Ala. 1993) (Maddox, J. dissenting).

action for the wrongful death of a nonviable fetus.[197] While this argument does have merits, it is incumbent upon the judiciary to interpret the existing statutes, giving them meaning and supplementing them.[198] In interpreting a statute, the courts must try to find "the best method to further the general goal of the legislature in adopting such a statute, and [the] common law principles governing its application."[199] Therefore, when courts defer to the legislature to expand wrongful death protection to the nonviable unborn, those courts are shirking their responsibility to further the general goal of the legislation.[200]

The general goal of wrongful death statutes is to protect human life by deterring potential wrongdoing and allowing the family of a deceased individual to recover damages.[201] This goal is furthered when wrongful death statutes include a nonviable fetus within the definition of a "person."[202] Previously, judicial action removed some of the artificial distinctions, such as the single-entity rule and the born-alive rule, which barred recovery.[203] There is "no doubt the law will continue to need thoughtful and vigorous judicial action to fill the gaps that inevitably exist in all statutes, including, or especially, the wrongful death acts."[204]

When wrongful death statutes first entered the Anglo-American legal landscape there was a great and widespread need for legislatures to adopt wrongful death statutes to deter people from intentionally or negligently killing one another, and to further the underlying principle of tort law, that victims will be compensated for their injuries.[205] In 1846, the need for wrongful death statutes protecting nonviable unborn children was not as widespread as was the need for general protection; however, this does not indicate that the overall need was not as great. What it does indicate,

197. *See* Santana v. Zilog, Inc., 95 F.3d 780, 785 (9th Cir. 1996). *See* Thibert v. Milka, 646 N.E.2d 1025, 1026 (Mass. 1995).

198. Farley v. Sartin, 466 S.E.2d 522, 530 (W. Va. 1995).

199. *Id.*

200. *See id.*

201. *Gentry*, 613 So. 2d at 1246 (Maddox, J., dissenting).

202. *See id.*

203. *See* discussion *infra* § II B.

204. KEETON ET AL., *supra* note 28, at 960.

205. Although criminal homicide laws of the age also deterred intentional and sometimes negligent killing of another, with no formal police departments until the late nineteenth century, the enforcement of laws was more of a private act or right rather than an activity of the King or the government. The hope was that public peace would be preserved through this system of private right. *See* LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 vii, 1-13, 171-98 (1956). The passage of Lord Campbell's Act in 1846 was consistent with this notion that private rights provided the proper deterrence to preserve the peace.

is that this need is not so widespread to require legislation; it is the smaller, more focused need for judicial action. It is well within the judiciary's discretion to fill in the gap in wrongful death statutes that protects tortfeasors from liability based on the distinction of viability. It is the judiciary's responsibility to meet these great needs for the small number of people who have fallen through the gaps of wrongful death statutes.

C. The Supreme Court's Adoption of a Viability Test in Abortion Cases Does Not Prevent Rejection of the Viability Test in Nonviable Wrongful Death Actions

Some courts continue to use the viability test in wrongful death actions because the United States Supreme Court views viability as the point at which a state's interest in potential human life becomes compelling and outweighs a woman's interest in having an abortion.[206] In addition, these courts fear that rejection of the viability test might create an inherent conflict between abortion decisions and wrongful death statutes.[207] However, abortion decisions have no application to wrongful death statutes because in wrongful death cases, there is no need to balance a woman's interest against a state's interest.[208] Abortion decisions are not controlling when analyzing wrongful death claims.[209] Furthermore, defendants in these cases have no privacy interest in need of protection; allowing defendants to use a woman's right to privacy as a defense to their invasion of her privacy is illogical on its face.[210]

The Supreme Court held that a fetus is not a "person" in terms of the Fourteenth Amendment because "the unborn have never been recognized in the law as persons in the whole sense,"[211] but could be recognized as persons in a limited sense.[212] The Court also recognized that "some States permit the parents of a stillborn child to maintain an action

206. *See* Toth v. Goree, 237 N.W.2d 297, 301 (Mich. App. 1975).

207. *See id.*

208. *See* Roe v. Wade, 410 U.S. 113, 162 (1973) (noting that some states permit prenatal wrongful death actions, but that the issue at hand in *Roe* was the rights of the pregnant woman).

209. *See id.*

210. *See* Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790-91 (S.D. 1996) (rejecting the argument that a woman's right to abortion precludes a cause of action for the wrongful death of a nonviable because to do so would give the tortfeasor the same ability to terminate a pregnancy as the mother) *Id.* at 791.

211. *Id.*

212. *See id.* (discussing the recognition of unborn children for property rights and interests).

for wrongful death because of prenatal injuries."[213] The Court noted that the nature of such actions was to vindicate the parents' interest in potential life and thought that this was consistent with its view of a fetus.[214]

In fact, the Supreme Court's abortion decisions and the decisions regarding expansion of wrongful death actions to include nonviable fetuses have some common reasoning. The Supreme Court's view on abortion is that a mother's privacy interests must be balanced with the state's interest in protecting potential life.[215] Expanding wrongful death protection to all unborn children, regardless of viability, is consistent with both of these interests. It is consistent with a state's legitimate interests in protecting the health of a woman and the life of a fetus that may become a child, because imposing liability on a tortfeasor protects the life of a mother and a fetus by deterring those who might harm them.[216]

Expansion of wrongful death protection to all fetuses would also be consistent with a woman's right to choose. Not only may a woman choose to have an abortion, she may choose to carry her child to term. If someone causes the death of a woman's unborn child, through intentional or negligent conduct, that person has infringed upon the woman's choice to have a baby, thus violating her right to privacy.[217] Expansion of wrongful death statutes does not violate a woman's right to have an abortion. The Court in *Casey* stated that states cannot place a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,[218] but in no way does expansion of prenatal wrongful death actions against third persons place an obstacle or undue burden on a woman seeking an abortion.[219]

IV. Judicial Action Discontinuing Viability Requirement in Prenatal Wrongful Death Actions Would Alleviate Some of the Confusion Surrounding the Status of an Unborn Child While Remaining Consistent with the Supreme Court's Abortion Decisions

Some commentators believe that action must be taken to alleviate the confusion and inconsistencies surrounding the law dealing with unborn

213. *Id.* (footnote omitted).
214. *See id.*
215. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992).
216. *See id.*
217. *See id.* at 878.
218. *Id.*
219. *See id.*

children.[220] They advocate the use of a single, all purpose definition of "person" for constitutional, criminal, and tort issues. These critics call for the use of an "all-in-one" definition of person not so much for the utility or efficiency it would provide to our laws and jurisprudence, but as a backdoor approach to attack a woman's abortion rights.[221]

A way to alleviate some of the confusion surrounding the law dealing with unborn children is to reject the viability standard in all prenatal tort actions, including wrongful death actions. This would not undermine a woman's right to an abortion, or require an "all-in-one" definition of the term "person." This proposal would not give one consistent definition of the word "person" to be used in all areas of the law because an "all-in-one" definition might cause more confusion and inconsistency.

Adopting an all-purpose definition of "person" may give consistency to that term in general, but it could cause greater inconsistency in different areas of the law. A new general definition might be inconsistent with a certain area of law's development, history, and common law precedent. The insistence of many critics on a single definition is fueled by the ulterior motives of attacking a woman's abortion rights, and does not go to the heart of the problem in prenatal law — confusion. This focus on the exact definition of a word takes the mechanical and formalistic view of the law of which Chief Justice Stone warned.[222]

Justice Holmes once said "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the tone in which it is

220. *See* Klasing, *supra* note 68, at 977-79 (advocating a uniform definition of "person" in all areas of law, and making conception the point at which a "person" is defined). *See also* Agota Peterfy, Commentary, *Fetal Viability as a Threshold to Personhood*, 16 J. LEGAL MED. 607, 635-36 (1995) (criticizing the inconsistencies in fetal personhood, and advocating that states be given the power to make all decisions regarding fetuses).

221. *See* Klasing, *supra* note 68, at 978-79 stating:

> It is therefore unlikely that a frontal attack on the right to abortion will succeed in establishing rights for an unborn child . . . . Those who seek a uniform definition of "person" that places proper value on an unborn child should begin to focus more on wrongful death law and criminal homicide law . . . . A step by step approach beginning with the "born alive" states, should have the effect of changing public attitude towards unborn children. Only when the public is changed, will the United States Supreme Court change.

Id.

222. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946) (quoting Chief Justice Stone as saying "[i]f our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to come at last but a dry sterile formalism"). *Id.* (quoting Stone, *supra* note 81, at 9-10).

used."[223] For example, there are a number of different common usages of the word "love." When a man says he loves his spouse, it has a different meaning than when he says he loves his daughter, or his mother, or his car. Definitions vary according to contexts; why not allow the law to have the same flexibility? Why not allow slightly different definitions in the different contexts of the various areas of law?

Instead of focusing on a strict, all purpose definition, courts could alleviate confusion by rejecting the arbitrary viability test in wrongful death actions. Adopting a more fluid definition is the next logical step in the development of wrongful death and prenatal injury law. While it was the wrongful death statutes that first corrected the unjust result of the common law notion that it was cheaper to kill your victim than to injure him, it was the judiciary that rejected the arbitrary line, which brought about unjust results and blocked the underlying goals of the statutes, to provide compensation to the families of wrongful death victims.[224] It is again time for the courts to erase another arbitrary line, the line of viability.

Rejection of the viability test would not only be consistent with the underlying goal of the wrongful death statutes, it would also be consistent with the Supreme Court's abortion opinions.[225] States cannot place an undue burden on a woman's right to have an abortion,[226] but bringing an action against a third party who intentionally or negligently terminated a wanted pregnancy does not place any obstacle in the way of a woman wanting to have an abortion. Extending the cause of action to all unborn children would fit squarely with the other interest considered in *Roe* and *Casey*, the state's interest in protecting potential life.[227] It is very unlikely that under *Casey* an extension of wrongful death protection to all unborn children could be found unconstitutional. In this simple but hopefully effective proposal, state courts should adopt the minority view, as did the Supreme Court of West Virginia in *Farley v. Sartin*.[228]

The *Farley* court was indeed sensitive to the smaller groups that occasionally fall through the gaps of legislation written to cover the widespread needs of the general population. The *Farley* court encouraged legislative action, but it did not feel compelled to wait for the legislature before it could allow the family of a dead unborn baby to at least have

223. Lingle, *supra* note 49, at 489 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).
224. *See* discussion *infra* § II.
225. *See* Planned Parenthood of Southeastern Pa. V. Casey, 505 U.S. 833, 846 (1992).
226. *Id.*
227. *See* discussion *infra* § III C.
228. 466 S.E.2d 522 (W. Va. 1995).

their day in court. In expanding the wrongful death cause of action to all unborn children, the Supreme Court of West Virginia rejected what it viewed to be an unjustified and unpersuasive majority position.[229] The majority position, allowing a cause of action for a viable unborn child, but not a nonviable one, resurrects the same problems that the wrongful death statutes were written to solve.[230]

If more states followed the minority position and allowed the wrongful death statutes to protect all unborn children, not just viable ones, the law surrounding prenatal torts would be less confusing, and more just. As the Supreme Court stated in *Casey*, the minority position allowing wrongful death protection for all unborn children is consistent with the Supreme Court's mandate that no state put any undue burden on a woman who chooses to have an abortion.[231] If the minority position were followed by more states, then the injustice the wrongful death statutes were written to correct could again be avoided.

V. CONCLUSION

George Santayana said that "those who can not remember the past are condemned to repeat it. . . . This is the condition of children and barbarians in whom instinct has learned nothing from experience."[232] Throughout the development of the wrongful death action and recognition of prenatal torts, the law has acted on instinct as well as experience. The instinct of the common law let tortfeasors who killed their victims get away without facing any civil liability. This unjust result, based on an errant instinct, was corrected after it had been learned through experience that it was intolerable to allow it to be cheaper to kill someone than to scratch him. Justice Holmes's instinct that an unborn child does not have any independent rights or causes of action was corrected through later judicial action based on the experience that the law must keep pace with science and technology.

The issue of wrongful death for a nonviable fetus is still an unsettled issue in the law. Whether courts will act upon their instinct and do nothing, or act upon experience and adopt *Farley* remains to be seen. The only obstacle keeping courts from expanding wrongful death actions to nonviable fetuses is the courts' instinct that the legislature must provide

229. *See id.* at 532.
230. *See id.* at 533-34.
231. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992).
232. GEORGE SANTAYANA, 1 THE LIFE OF REASON 284 (1905).

direction. Courts, however, have long extended the protection of such statutes to unborn children who are viable at the time of the injury and subsequently born alive. Furthermore, extending a statute's protection to cover a nonviable fetus is well within the scope of legitimate judicial interpretation. By adopting the minority view, and thus rejecting the viability test in wrongful death actions, courts would be taking the next logical step in the history of the development of the wrongful death action, without infringing on a woman's right to privacy in her choice about abortion. Therefore, viability should no longer be a prerequisite for a wrongful death cause of action. Otherwise, the law will again be the child who, acting on instinct rather than experience, is condemned to repeat an unfair and unjust history.

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